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IN THE

Supreme Court of The United States

OCTOBER TERM, 1963

No. 337

DOMINICK BARTONE,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

O. B. CLINE, JR.
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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statutes and Rules Involved	2
Statement of the Case	3
Reasons for Granting the Writ	6
Certification of Service	7
Appendix A — Opinion Below	8
Appendix B — Judgment	10
Appendix C — Petition for Rehearing	12
Appendix D — Order Denying Rehearing	16
Appendix E — Letter Denying Rehearing	17
Appendix F — Letter Correcting Date	19
Appendix G — Rule 32(a) and Rule 43 of FRCP	20

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COMES NOW DOMINICK BARTONE, Petitioner herein, by and through his undersigned attorneys, and respectfully prays this Honorable Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on the 24th day of May, 1963, and the Order of the same court Denying Rehearing entered on the 9th day of July, 1963.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is not yet reported. The text of this opinion, however, is found in Appendix A. hereof and the advice to counsel as

to the Order Denying Rehearing is found in Appendix E. hereof. In view of the fact that the above letter was apparently misdated June 9, 1963, rather than July 9, 1963, as was correct, a letter from the Clerk as to the date is included as Appendix F. hereof.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to the provisions of Rule 37 (b) (1) (2) of the FEDERAL RULES OF CRIMINAL PROCEDURE. The United States Court of Appeals for the Fifth Circuit rendered its opinion in this cause on the 24th day of May, 1963, (Appendix A.) and thereafter a Petition for Rehearing was timely filed (Appendix C.) and thereafter the said Court entered its Order Denying Rehearing without opinion, (Appendix E.) as corrected (Appendix F.).

QUESTION PRESENTED

May a United States District Judge orally revoke the probation of a Defendant in open court and in the presence of the Defendant and his counsel and impose a sentence of confinement for a specific period of time (R. p. 127) and thereafter enter a formal written judgment and commitment in which a larger and longer sentence of confinement is imposed and set forth?

STATUTES AND RULES INVOLVED

Rule 32 (a) and Rule 43 of the FEDERAL RULES OF CRIMINAL PROCEDURE. Text of same are set forth in Appendix G. hereof.

STATEMENT OF THE CASE

Petitioner herein was originally arrested at the International Airport at Miami, Florida, by United States Customs Agents, along with eight or ten other persons, including the Dominican Counsel, at Miami, Florida, and charged with the violation of the neutrality laws of the United States. The alleged violation involved the attempted exportation of certain items designated as munitions of war, in the code of Federal Regulations as authorized by the Neutrality Act.

Subsequently, an Indictment was returned by the Grand Jury at Miami, Florida, in the United States District Court for the Southern District of Florida, and charging the Petitioner and some eight or ten other persons with a conspiracy to bribe federal officials and to export arms and ammunition from the United States without first having obtained an export license from the State Department of the United States. Subsequently, the United States Attorney became convinced that the Petitioner herein had no knowledge of the attempted bribery and the Indictment as it relates to the Petitioner herein was dismissed, the Petitioner waived indictment and an Information was filed charging a violation of the neutrality laws relating to the attempted exportation of arms to which the defendant and Petitioner herein entered a plea of guilty. The Court, thereafter, ordered a presentence investigation, adjudged the Defendant guilty, withheld the imposition of sentence of confinement, placed the Defendant on probation for a period of three years and fined the Petitioner herein the sum of Ten Thousand Dollars ($10,000.00).

Upon petition by the counsel for the Petitioner, the District Court reduced the fine to Seventy-Five Hundred Dollars ($7,500.00) from Ten Thousand Dollars ($10,000.00), which fine was, subsequently, paid in full in less than one year from the date of imposition of sentence.

After the payment of the fine the Petitioner herein, by and through his counsel, petitioned the District Court to be released from the probation. Several hearings were had upon the Petition for Termination of Probation and in each instance the petitions were strenuously opposed by the United States Government authorities. A final hearing on the Petitioner's Petition for Termination of Probation was set down for hearing shortly prior thereto, the Government, acting through the United States Probation Office, procured the warrant for the arrest of the Petitioner for alleged violation of the terms of the probation. Subsequently, a mix-up as to the appearance of the Petitioner occurred, however, the Petitioner finally did appear before the Court, was incarcerated for a period of approximately six weeks and thereafter the matter was brought on for hearing by the Court.

At the conclusion of the hearing, the Court determined that a violation of the probation had occurred and once again ordered a presentence investigation as to the sentence to be imposed for the alleged violation of probation. On the 14 day of September, 1962, the Petitioner herein appeared before the Honorable EMETT C. CHOATE, Judge of the United States District Court for the Southern District of Florida, at which time a sentence of confinement of one year was imposed. It should be noted that both the defendant and his counsel were present at this time, as may be

shown from the Record at page 116. Subsequent thereto, the Court, in the usual manner, entered its formal and written judgment and commitment, which judgment and commitment imposed a sentence of confinement longer and different than that orally imposed in open court in the presence of the defendant and his counsel. The Court, thereafter, denied the Petitioner's request for the setting of bail and upon a Petition to the United States Court of Appeals for the Fifth Circuit, at which time the question of the correctness or incorrectness of the sentence was called to the Court of Appeals attention and said Court of Appeals did enter its Order Setting a bond pending a determination of this matter.

Thereafter, the Government, acting through its attorneys, did petition the Court of Appeals to remand the cause for the purpose of correcting the sentence and, subsequently, an Order was entered denying this. Thereafter, briefs were submitted to the United States Court of Appeals for the Fifth Circuit by the Appellant, briefs submitted on behalf of the Appellee, the United States, and a reply brief submitted on behalf of the Appellant.

In a normal manner the cause came on for oral argument before the United States Court of Appeals and thereafter the opinion of the Court (App. A.) was entered on the 24th day of May, 1963. It should be noted that the opinion of the United States Court of Appeals failed to mention or take into any consideration the question of the impropriety of the enlargement of the sentence. This matter was called to the attention of the United States Court of Appeals by the Petition for Rehearing (App. C.) and, subsequently, the

Court of Appeals entered its Order Denying Rehearing without opinion (App. E. as corrected by App. F.).

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the Writ sought by this Petitioner should be granted for the reason that the decision of the Fourth Circuit of Rakes vs. U. S. A., 309 F. 2d. p. 686, is in direct conflict with the opinion of the Fifth Circuit in the case at bar. In support of this we need only to look to the Brief hereinbefore filed in this cause by the Government in which they quote from Rakes case (Supra) as follows:

> "The provision of Rule 35, which permits the correction of an illegal sentence at any time, provides the proper remedy, and the case *must be sent back* (emphasis added) to the District Court in order that the written judgments may be corrected to conform with the oral pronouncements."

From this we see that the Court of Appeals for the Fifth Circuit erred in ignoring this point raised by the Petitioner herein when the case was on appeal to the United States Court of Appeals for the Fifth Circuit.

It is, therefore, respectfully submitted that the United States Court of Appeals for the Fifth Circuit did err in the entry of the opinion herein and that the Writ herein sought

should be issued to resolve the dispute between the Fourth and Fifth Circuits of the United States Court of Appeal.

Respectfully submitted,

O. B. CLINE, JR.,
1518 duPont Building
Miami 32, Florida
and
NICHOLAS J. CAPUANO of
LURIE & CAPUANO
1409 Biscayne Building
Miami 32, Florida
Attorneys for Petitioner

By_____

CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of the fore going was this day of , 1963, mailed to the SOLICITOR GENERAL, Department of Justice, Washing ton, D.C.

_____

O. B. CLINE, JR.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 20024

DOMINICK BARTONE,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida

(May 24, 1963)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and DEVANE, District Judge.

PER CURIAM: This is an appeal from an order revoking the probation of the appellant. We have read the record carefully and conclude that there was ample basis for the exercise by the trial court of its discretion, in light of the clear violation of the terms of the probation, to revoke the order permitting appellant to remain at large.

The judgment is

AFFIRMED.

Adm. Office, U.S. Courts — Scofields' Quality Ptrs., Inc., N.O., La.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
/s/ CLARA R. JAMES
Deputy
New Orleans, Louisiana
July 23, 1963.

(SEAL)

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 1962

NO. 20024

D. C. Docket No. 11380-M-Criminal

DOMINICK BARTONE,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and DEVANE, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

May 24, 1963

Issued as Mandate:

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

NO. 20024

DOMINICK BARTONE,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida, Miami Division

---

PETITION FOR REHEARING

The appellant respectfully petitions this court for rehearing of the appeal herein on the following grounds:

The appellant respectfully suggests that the United States Court of Appeals, Fifth Circuit, erred in its judgment in that it failed to consider Point II in the appellant's brief in arriving at its opinion, which is as follows:

"THE COURT ERRED IN SENTENCING DEFENDANT TO A TERM OF IMPRISONMENT

DIFFERENT FROM THE TERM OF IMPRISONMENT PRONOUNCED IN HIS PRESENCE."

The appellant would like to point out that in said brief it is urged that the record shows that on September 20, 1962, the trial court in the presence of the defendant, sentenced him to a term of one year's imprisonment (R 127). Yet, the trial court entered a written order dated September 20, 1962, which ordered the defendant imprisoned for a term of one year and one day (R 107).

The appellant in his oral argument and his brief did not argue this point fully because of the fact that on the 15th day of November, 1962, the appellee by and through its counsel filed a motion to remand this cause to the District Court for correction of sentence and in said petition and motion filed on said date the appellee confessed error in that the court entered a written judgment order different from the oral pronouncement in court.

The appellee went further and in its brief, although it argues that it is not reversible error for the court to have acted in the manner that it had, it did agree in its argument that the oral pronouncement being different than the judgment order, it was necessary for the cause to be sent back to the trial court with directions to correct the written sentence to comply with the oral sentence made in the presence of the appellant.

It is the appellant's contention and the appellant wishes to cite *Rakes v. United States*, 309 F. 2d 686 (4th Cir. 1962). The court held in that case on page 686 that under Rule 43 of the Federal Criminal Rules of Procedure, the defendant

must be personally present at every stage of the trial including the sentencing and that the sentence to be served is that pronounced in the defendant's presence in open court and not the sentence set out in the written judgment of the court. The court went on further and stated:

> ". . . the case must be sent back to the District court in order that the written judgments may be corrected to conform with the oral pronouncements." *Rakes v. United States*, supra, at page 688.

The appellant respectfully suggests to the court that at the time the appellant applied for bail to this Honorable Court in October of 1962, an affidavit was filed by counsel setting forth that after the defendant had been sentenced to one year and had left the court with his counsel, the court then changed the sentence to one year and one day and later entered a written judgment order dated September 20, 1962, which was different than the oral pronouncement in open court. The Government agrees that this did take place and the Government agrees with the appellant that the cause should have been remanded to the trial court with directions to correct the written sentence to comply with the oral sentence made in the presence of the appellant.

Wherefore, the appellant respectfully requests this court to grant the appellant's petition for rehearing in this cause.

Respectfully submitted,

MAX LURIE
1409 Biscayne Building
Miami 32, Florida

Counsel for Appellant
and
O. B. CLINE
1518 Alfred I. duPont Building
Miami 32, Florida
Co-counsel for Appellant

By_____
Max Lurie

STATE OF FLORIDA)
: SS
COUNTY OF DADE)

MAX LURIE, being first duly sworn, deposes and says: That he is of counsel together with O. B. Cline for the defendant in the above-entitled cause and that he has this _____ day of June, 1963, mailed a true copy of the foregoing Petition for Rehearing to the following: EDITH HOUSE, United States District Attorney, Federal Building, Miami, Florida, and he further states that this petition is presented in good faith and not for the purpose of delay.

s/ Max Lurie

Sworn to and subscribed
before me this 7th day
of June, 1963.
s/ Claudia D. Davis
Notary Public, State of Florida
My Commission Expires
Notary Public, State of Florida at Large
My Commission Expires May 3, 1965
(SEAL)

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 20024

DOMINICK BARTONE,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(July 9, 1963)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and DEVANE, District Judge.

PER CURIAM: It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

APPENDIX E

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

Edward W. Wadsworth
Clerk

Post Office Box 23
New Orleans 6, La.

June 9, 1963

Re: No. 20024 — DOMINICK BARTONE, v. UNITED STATES OF AMERICA

Gentlemen:

You are hereby advised that the Court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,

s/ Edward W. Wadsworth
EDWARD W. WADSWORTH
Clerk

Mr. O. B. Cline, Jr.,
Attorney at Law
Miami, Florida

Mr. Max Lurie
Attorney at Law
Miami, Florida

Mr. Sheldon Krantz
Attorney at Law
Miami, Florida

APPENDIX F

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

Edward W. Wadsworth
Clerk

Room 408 — 400 Royal St.
New Orleans 6, La.

July 12, 1963

Mr. Max Lurie
Attorney at Law
Biscayne Building
19 W. Flagler Street
Miami 32, Florida

Re: No. 20024 — Dominick Bartone
- vs - United States of America.

Dear Sir:

In reply to your letter of July 11th, I wish to advise that the order denying rehearing in the above case was entered on July 9, 1963.

Very truly yours,
EDWARD W. WADSWORTH,
CLERK

By s/ G. F. Ganucheau
Deputy Clerk

BFG/lgc

APPENDIX G

Rule 32 (a) and Rule 43 of the FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 32

(a) Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

Rule 43. Presence of the Defendant

The defendant shall be present at the arraignment, at every stage of the trial, including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 337

DOMINICK BARTONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On September 20, 1962, petitioner's probation on a charge of attempting to export munitions illegally was revoked after a hearing in the United States District Court for the Southern District of Florida. The judge orally sentenced him to imprisonment for one year (R. 127). On the same date a written judgment was entered committing petitioner to imprisonment for one year and one day (R. 107).

On appeal, petitioner challenged the revocation of probation and also claimed that the court erred in

entering a written judgment which differed from the oral sentence. The government acknowledged that the written judgment was in error. The court of appeals affirmed the revocation of the probation, *per curiam*, without ruling on the validity of the sentence.

The only point raised by the petition for a writ of certiorari is the purported increase in the written sentence over the oral pronouncement. The government has never denied that the written record may be corrected to conform to the oral announcement. The correct procedure, however, is by a motion in the district court to correct sentence. Since there was no showing that the matter had been properly presented to the district judge, there was no occasion for the court of appeals to pass on the question. By the same token, it is not a matter for review by this Court.

Under the provisions of 18 U.S.C. 4161, petitioner may lose one day of good time each month by having his total sentence reduced by one day. Thus it is peculiarly appropriate to require petitioner affirmatively to request this correction in the district court before an order is entered which may result in a net loss.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

AUGUST 1963.

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